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Designing and Implementing a State Court ODR System: From Disappointment to Celebration

*David Allen Larson**

INTRODUCTION

For the past two and one-third years I have had the pleasure of working with the New York State Unified Court System to design and implement an online dispute resolution (ODR) platform. It truly has been an interesting, educational, at times character-building, and ultimately tremendously valuable experience. This article will share specific design components from the ODR platforms we proposed as well as some of the critical lessons I learned. The hope is that it will be helpful to those either contemplating or in the process of implementing a court-integrated ODR system.

State court systems rather suddenly are showing a tremendous interest in adopting court-integrated ODR systems.¹ I have been involved with ODR system design

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1. According to one of the most helpful websites for finding cutting-edge information about ODR, 46 court systems now are using ODR:

1. British Columbia Civil Resolution Tribunal (Province-wide)
2. Clark County Family Court (Las Vegas, NV)
3. Franklin County Small Claims (Columbus, Ohio)
4. Fulton County Small Claims (Atlanta, GA)
5. Ohio Court of Claims (Statewide)
6. Ottawa County Family Court Compliance (Grand Rapids, Michigan)
7. Travis County Small Claims (Austin, TX)
8. Utah Courts Small Claims (Statewide)
9. Tlaxcala Supreme Court (Mexico)
10. Faulkner and Van Buren County District Courts (Faulkner and Van Buren County, AR)
11. Sherwood District Court (Sherwood, AR)
12. DeKalb County State Court – Traffic Division (DeKalb County, GA)
13. Village of Ford Heights (Cook County, IL)
14. Jefferson County District Court (Louisville, KY)
15. 15th District Court (Ann Arbor, MI)
16. 74th District Court (Bay County, MI)
17. 10th District Court (Calhoun County, MI)
18. 65A District Court (Clinton County, MI)
19. Clinton Township, MI (41B District Court)
20. 54B District Court (East Lansing, MI)
21. 21st District Court (Garden City, MI)
22. 20th Circuit Court (Grand Haven, MI)
23. 61st District Court (Grand Rapids, MI)
24. 31st District Court (Hamtramck, MI)
25. 32A District Court (Harper Woods, MI)
26. 30th District Court (Highland Park, MI)
27. 55th District Court (Ingham County, MI)
28. 22nd District Court (Inkster, MI)

for almost twenty years, and for the great majority of that time all the significant progress came from independent private sector alternative dispute resolution providers such as Modria (now part of Tyler Technologies Inc)² and SmartSettle³, or business-specific embedded systems like the one for eBay. Courts systems now are increasingly interested in ODR, which is significant because sustainability has been one of the greatest challenges for private independent ODR providers. The financial support that a judicial system can offer makes it easier to build and maintain an ODR system. The article also will describe my experience as the System Designer for the New York State Unified Court System. The details for those proposed designs and the lessons learned should help those moving forward with similar projects.

I became involved in New York's ODR project in October 2016 as the American Bar Association liaison for an Enterprise Fund Award that the ABA provided to New York to assist in creating a pilot ODR system. The grant was titled "Expanding Access to Legal Services through the Advancement of Court-Annexed Online Dispute Resolution." The ABA sections that participated in the grant application included my section, the Section of Dispute Resolution, the Judicial Division, the Young Lawyers Division, the ABA Fund for Justice and Education, the Section of Science & Technology Law, and the Commission on the Future of Legal Services. I have invested almost two thousand hours in this project, so it obviously is very important to me. The following article is based my own observations and conclusions and was not written on behalf of the New York State Unified Court System.

NEW YORK STATE UNIFIED COURT SYSTEM—ONLINE CREDIT CARD DEBT COLLECTION

My first direct exposure to the New York project was at an October 2016 orientation meeting with the New York staff employees who would be working on the

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29. 12th District Court (Jackson County, MI)
 30. 4th Circuit Court (Jackson, MI)
 31. 62B District Court (Kentwood, MI)
 32. City of Lansing – Income Tax Division (Lansing, MI)
 33. 54A District Court (Lansing, MI)
 34. 16th District Court (Livonia, MI)
 35. 1st District Court (Monroe County, MI)
 36. 50th District Court (Pontiac, MI)
 37. 46th District Court (Southfield, MI)
 38. 23rd District Court (Taylor, MI)
 39. 14A District Court (Washtenaw County, MI)
 40. Washtenaw County Friend of the Court (Washtenaw County, MI)
 41. 29th District Court (Wayne, MI)
 42. 14B District Court (Ypsilanti Township, MI)
 43. Cleveland Municipal Court (Cleveland, OH)
 44. Franklin County Municipal Court (Franklin County, OH)
 45. Farmers Branch Municipal Court (Farmers Branch, TX)
 46. Hartford and New Haven Connecticut

See *Online Dispute Resolution Spreading in Courts*, NAT'L CTR. FOR TECH. & DISP. RESOL. (Mar. 20, 2019), <http://odr.info/>.

2. TYLER TECHNOLOGIES, <https://www.tylertech.com/products/modria> (last visited Apr. 25, 2019).

3. SMARTSETTLE, <https://smartsettle.com> (last visited Apr. 25, 2019).

project. Assistant Deputy Counsel Diana Colon was assigned leadership responsibility for the project.⁴ Ms. Colon did not have a background in or experience with ODR before the project began. But she worked diligently to educate herself and assumed primary responsibility for moving the project forward. She has devoted a remarkable amount of time and energy to the two New York ODR projects (both are discussed below) and any success that an ODR project achieves will be in large part a result of her efforts.

Vikki Rogers was the other critical contributor during the first year of the project. During the summer of 2016, the American Bar Association was deciding what project it should support with an Enterprise Grant. Ms. Rogers and I suggested an ODR pilot project. After several meetings and much consultation, the American Bar Association decided to offer a grant to the New York State Unified Court System to design and implement an ODR platform. Although we both were very excited about the project, we also both were hesitant to make a commitment because we worried it might take much more time than we anticipated. Ms. Rogers and I both were employed in fulltime positions at the Elisabeth Haub School of Law at Pace University and the Mitchell Hamline School of Law, respectively. We were so excited about the project, however, that we agreed to serve as the ABA liaisons.

It is fair to say that our concerns about the time commitment were well-founded. Ms. Rogers and I each spent approximately 1,000 hours on the New York project that first year alone. Ms. Rogers had numerous significant responsibilities at Pace University, but nonetheless was devoted to the subject matter and the project. Working our way through the New York state credit card debt collection regulatory environment was extremely challenging. Among other tasks, Ms. Rogers devoted significant time to creating a detailed hierarchal “mind map” to identify and capture the numerous state, county, and city-mandated consumer protections and debt collector requirements.⁵ Unfortunately for everyone who remained involved with the New York project, Ms. Rogers accepted a new employment position at the end of the first year. She no longer had the time or the flexibility necessary to work on the project and she had to withdraw. Her leadership and contributions were significant, and her expertise was missed after she withdrew.

One reason that court systems are experimenting with, or implementing, ODR is the promise of efficiency. Low value, high volume cases that often involve unrepresented litigants can consume a surprising amount of judicial time and resources. An ODR system may be able to intake and resolve those disputes in a more cost-efficient manner. Additionally, there is growing acceptance of the idea that an ODR system can increase access to justice.⁶ In low value, high volume cases, un-

4. Dan Weitz, Director for Division of Professional & Court Services and Statewide ADA Coordinator; Barbara Zahler-Gringer, Counsel for Administration and Operations at NYS Unified Court System; and Barbara Mule, attorney at the NYS Office for Court Administration, frequently participated in discussions concerning the proposed ODR system.

5. When I displayed the “mind map” at a symposium held at the Ohio State School of Law, the panel of expert presenters and the audience literally gasped at the intricate and complicated visual representation.

6. *Expanding Access to Justice Through Online Dispute Resolution: The Digital Edge*, LEGAL TALK NETWORK (Feb. 13, 2018), <https://legaltalknetwork.com/podcasts/digital-edge/2018/02/expanding-access-to-justice-through-online-dispute-resolution/> (“And while I know some attorneys and judges and court staff may be a little anxious seeing technology come in and disrupting the way the system has

represented litigants often do not understand court procedures and struggle to present their cases effectively, or perhaps simply give up and do not even appear for the hearing.

The Ohio Board of Tax Appeals, for example, uses a state-wide online dispute resolution platform for property assessment appeals.⁷ Taxpayers using the Modria platform that Ohio has adopted begin the ODR process with a diagnosis module that will help them determine whether it is worthwhile to move forward with an appeal. Many cases are resolved at this initial stage. If the taxpayer proceeds, Modria provides the case management framework that will take the case to completion. Taxpayers do have the opportunity for a hearing, but the Hearing Examiners use Modria's templates and scripting to write their decisions.

At this date there is little doubt that ODR can assist unrepresented litigants, particularly in uncomplicated cases without numerous issues. New York, in contrast, turned to ODR to resolve a specific, and very real, crisis.

The New York pilot project has a unique genesis. Rather than experimenting with ODR to determine whether it could improve access to justice for unrepresented litigants in relatively straightforward cases, the New York court system decided that its ODR system should focus exclusively on credit card debt collection cases.⁸

I learned at my first meeting in October 2016 that credit card debt collection was going to be the case-type for the ODR system. I expressed my concern that the subject matter was too regulated and complicated and not the appropriate subject for a pilot ODR project. The New York staff explained that consumer debt was chosen because of the significant numbers of unrepresented litigants in these case types who do not have access to legal representation.⁹

The New York court system was not mistaken in its recognition that the credit card debt collection process in New York is deeply flawed. When debt holders sue consumers, only four percent of consumer defendants are represented by counsel. Consumer defendants frequently do not file answers in debt collection lawsuits for a variety of reasons.¹⁰ Although New York recognizes that there is a problem with some process servers who never actually serve defendants ("sewer service") and does have a two-step process wherein the court mails out a second notice to the defendant, individuals still may not receive that second notice or may not have the time or resources to leave their employment or home and travel for a court hearing. Debt collectors regularly obtain default judgments, which then allows debt holders to attach wages, seize property, and seriously damage consumers' credit histories.

worked, I believe if we get ahead of it and we think creatively about it, this is going to be a huge expansion in access to justice, particularly for people that have not been able to make use of the services of the court in the past.").

7. Robert Ambrogi, *Tax Boards Use an Online System to Resolve Disputes*, ABA J. (Mar. 2015), http://www.abajournal.com/magazine/article/tax_boards_use_an_online_system_to_resolve_disputes/.

8. PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 31 (2015), http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/2015_Access_to_Justice-Report-V5.pdf ("Consumer debt has emerged as an area that would be particularly appropriate for a pilot ODR program, available to both represented and unrepresented parties. Low-income parties are generally without counsel in these proceedings and many such proceedings are brought in small claims parts.").

9. *See id.*

10. N.Y. APPLESEED, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 22 (2010), <https://www.appleseednetwork.org/wp-content/uploads/2012/05/Due-Process-and-Consumer-Debt.pdf> ("In cases filed in the five boroughs in October 2008, only 7.4% of consumer debt defendants filed an answer.").

The ODR pilot project would attempt to determine whether default rates could be reduced and consumers' access to justice could be increased via an online dispute resolution system. Clearly this is a commendable goal, but it created substantial regulatory compliance challenges and unanticipated resistance.

Because credit card debt collection is so heavily regulated, at that first meeting in October 2016 I suggested that New York instead should focus on small claims cases. But the court system wanted to address the very real consumer debtor access to justice problem. Consequently, the subject matter for the pilot ODR project in New York was going to be credit card debt collections.

THE PROPOSED ODR DESIGN FOR THE NEW YORK STATE UNIFIED COURT SYSTEM

A comprehensive conceptual design was drafted to guide the development and implementation of the New York ODR system. To be as thorough as possible, eighteen months were spent outlining the details of the current New York debt collection process, listening to every ODR provider that could be identified, communicating with a wide range of stakeholders, and coordinating with New York court staff.

One of the difficulties with designing a court-integrated ODR process is that the ODR process must be seamlessly integrated into the existing court management system. Either that, or the court management system itself must be modified. The New York State Unified Court System is not fully digitized, so it was necessary to determine whether each specific step in the process would be managed digitally or manually. There was no way around the fact that the case processing system would be dependent at times on manual support.

Managing each step in the process therefore requires close attention to detail. Determining how to initiate an ODR process when a court filing and management system is not fully digitalized, for instance, requires some creativity. The working premise in New York was that, first, complaints will have to be filed in person with the Civil Court of the City of New York (New York Civil Court) by creditors or debt buyers' legal counsel (plaintiff). The Court then will mail the defendant additional notices about the claim and the availability of an ODR process. A sixty-day window will be created before the answer must be filed, starting on the day that process is served and not the day that the defendant receives the New York Civil Court-mailed notice of the claim. The sixty-day window is available only for consumer defendants using the pilot ODR system and must be created to give the parties enough time to work through their dispute using the ODR platform. For in-person cases, the typical window of twenty or thirty days (depending on the mode of service) would still be controlling. If a resolution is not achieved using the ODR platform during the sixty-day window period, then the defendant will revert to the traditional process and file the answer in person at the New York Civil Court.

Decisions and adjustments unique to each court system may have to be made when designing a court-integrated ODR system. New York is not unique. There will be challenges in every court system. But whatever design is chosen, it must be understandable and easy to follow. And it is important to ensure that individuals who begin to use the ODR platform continue to conclusion. Engagement is critical. When considering what would be included in a request for proposals to build the

ODR system, we encouraged proposals intended to facilitate consumer engagement with the ODR system.

Yet one can never lose sight of the fact that there always is “the ideal,” and then “the real.” Any court system considering ODR that, like the New York Civil Court, is not fully digitalized will have to remind the individuals and organizations submitting proposals to build the system to the courts’ specific limitations.

The following discussion does not capture every detail considered for the New York ODR credit card debt collection pilot project. And although it closely follows the proposed conceptual design for the ODR platform, it is not a verbatim presentation of that design. It does provide a guide, however, for many of the issues and challenges confronted when constructing any court-integrated ODR system and, in particular, an ODR credit card debt collection system.

As described above, in New York an ODR case will begin offline. After the parties agree to participate, then the ODR platform must assume responsibility for the parties and help them move towards resolution. The material immediately following includes excerpts from the conceptual design, which are printed in italics, supplemented by my commentary.

Invitation

The conceptual design begins with an invitation to experienced providers and designers to submit proposals to build *a court annexed online dispute resolution for consumer credit card claims*. The invitation was never issued, but an invitation was created for a different, second case type (discussed at the conclusion of this article). The invitation for the credit card cases would have been similar. That invitation stated:

- *The system should be hosted in the cloud and available to users on the internet using secure protocols (HTTPS).*
- *Hosting services should be in a secure environment. Proposals should describe how vendors protect their servers and databases from unauthorized access and data loss. Data attributable to a specific individual or that could be used to identify an individual will not be made publicly available, nor will it be sold or used outside of the ODR system. Data should not leave the United States. Vendors should regularly scan their systems for security vulnerability. NY UCS should be able to scan vendor’s system or vendor should send NY UCS vendor’s security check results.*
- *The system should be mobile-friendly and have a responsive design.*
- *The system should be able to be expanded to have multi-language capabilities in the future.*
- *The system should be able to provide guided pathways scaled for small claims cases.*
- *The system should be intuitive and have a simple design that minimizes the number of clicks per activity, pre-populates fields with available data, minimizes duplicity and eliminates excessive forms.*
- *The system should have a mechanism for secure document upload and download.*
- *The system should have a mechanism for reporting problems.*

- *The system will provide an online financial gateway for the collection of mandatory fees for each case to be paid to the court via credit cards, bank or debit cards and/or payment systems such as PayPal. The online financial gateway should be PCI DSS compliant.*
- *The system should be able to provide system notifications via text and/or email.*
- *The system will incorporate Expert System information updates as soon as they are provided by NY UCS.*
- *The system should be ADA compliant and meet 508 standards. (see <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/final-rule/text-of-the-standards-and-guidelines>).*
- *Feedback, reports and data requested by NY UCS should be in a machine reading format, preferably XML.*
- *Proposals should describe how vendors will work collaboratively with NY UCS to build the software solution as efficiently as possible.*
- *Proposals should explain whether the following technology options for the small claims ODR system are available, how they might be integrated, and provide recommendations regarding suitability for small claims court cases:*
 - *Artificial Intelligence*
 - *Live Chat Capability*
 - *Video Capability*

Proposals also should offer an intuitive and simple design that minimizes the number of clicks per activity, pre-populates fields with available data, minimizes duplicity, and eliminates excessive forms.

The invitation is followed by a system overview.

Overview of the Conceptual Design for the ODR System

The ODR system would have a six-month pilot period and would be limited to cases filed by a designated group of plaintiffs (creditors and debt buyers represented by legal counsel) that have agreed to participate in the pilot. Almost all the defendants (consumers) in these types of cases are pro se and participation in the pilot would not be mandatory. The consumers decide whether to participate in the ODR system.

The consumers also will be made aware of their options to retain counsel and, if retained, counsel may participate in the process.

The ODR system is not intended to digitize, automate, or replace any feature in the current NY Court system for resolving consumer credit card claims. Rather, the ODR system's goal is to increase access to justice by offering consumers an alternative approach that will supplement and complement existing court debt collection procedures. After a claim has been filed, the ODR system will provide consumers with an opportunity to better understand the process and their individual cases. It also will provide the consumer and the debt holder with online tools to help settle the case within a limited period of time. Unless a settlement is achieved

or the case is discontinued, the case filed in the NY Court will continue to final disposition.

More specifically, the ODR system shall include two dispute resolution stages with distinct user and system requirements. Stage 1 is an expert system enabling consumers to access information concerning their alleged consumer credit card debt. Stage 2 offers both party-to-party negotiation and mediation.

Accessing the ODR System

Consumer (Defendant) Access

Consumers will be made aware that the ODR system is available via written notice that will accompany the additional notice sent to defendants by mail pursuant to 22 NYCRR sec. 202.27-b (sent by the Clerk's office after plaintiffs have filed their case). The one-page "flier" will include information about the ODR system and instructions on how to access the system's landing page. Parties will have a 60-day window from the date of service to resolve their disputes using the ODR platform.

Complaints will be filed in person at the Court by creditor or debt buyer's legal counsel (plaintiff). The Court will mail defendants additional notice about the claim and the ODR system. Defendants will have a sixty-day window before the answer must be filed in person at the Court. The sixty-day window is available only for consumers using the ODR system. (More information regarding the filing period can be found below.)

Plaintiff Debt Holders' Access Creditors and debt buyers are the plaintiffs in credit card debt collection cases, and they may be plaintiffs in numerous cases. The ODR platform must provide a way for them to remain organized. In the New York conceptual design, *plaintiffs participating in the pilot will be given a username and password, and a web address to a landing page to sign-in and access their cases pending on the platform.*

A separate landing page for consumer/defendants also must be provided.

Landing Page for Consumers *The conceptual design explains that the entire website, including the landing page, should be designed in a manner that is both consumer and defendant-oriented (not designed for plaintiffs). The information should be helpful to consumer-defendants, individuals who have not been sued, debt holders, and anyone who wants information about debt collection and legal or financial services. The website design should foster initial engagement as well as a user experience that cultivates continued engagement with the ODR system (as appropriate) until a satisfactory resolution is achieved. The parenthetical "as appropriate" was inserted because situations can arise, as discussed later, where it is appropriate to abandon the ODR process and return to the traditional court processes.*

Keeping in mind that the ODR website must be both consumer and debt holder friendly, an ODR credit card debt collection system also must be careful to protect consumers. One reason, for example, is because repeat-user debt holders will have an inherent advantage over single-user consumers. The New York system design purposely emphasizes consumer protection, which will be apparent as soon as someone engages with the website. There was a significant concern, however, that as a result of this effort to protect consumers, debt holders might look at the website and perceive the system as so pro-consumer that they would refuse to support or

use the system. In response to this concern, during the more than two years of consulting with consumer groups, consumer advocates, and creditors, we made a concerted effort to recognize creditors' legitimate interests. We explained to creditors that the benefit of being able to directly engage with consumer debtors to work out a resolution was better than spending time and resources getting a default judgment and then trying to collect the debt.

When parties interact online, unproductive and destructive behavior is a possibility. New York responded to this concern by stating in its conceptual design that *whoever builds the ODR technology platform must make it clear that it is part of the New York City Civil Court system and should be engaged in a respectful manner. Participants would be advised that there is court oversight of the platform.*

Expert System Description

After consumers agree to use the ODR platform, they will be able to access an Expert System (ES). The Expert System will provide helpful information for anyone interested in, or affected by, debt collection processes. Therefore, a court system may want to make it available to anyone who visits the website. It was anticipated that *the New York ES would offer multimedia content that could be accessed by consumers from the landing page to facilitate their understanding of the court processes, the ODR system, and their individual cases.* Expert Systems can take different forms. They may, for instance, follow a question-answer decision tree model similar to what users have encountered when using software programs like TurboTax. Users are asked a series of questions that progressively become more focused and specific depending on the answers provided. It was envisioned that *the New York ES would make multimedia content accessible to consumers via navigation through guided pathways (following the model of progressively more specific questions), interaction via links to materials on topical web pages, and natural language queries.*

The ES should guide consumers as though they had an expert at their side. The goal of the ES is to equip consumers with an understanding of the court process and their options so that they can engage competently in a negotiation or mediation, or otherwise with the plaintiff, to have their case resolved. A consumer's initial substantive interaction with the ODR system will be through the ES, so it is critical that the first impression is positive and that the user is encouraged to stay engaged. Particular attention should be given to a user experience that compels users to take reasonable first action toward the resolution of their dispute and encourages (incentivizes) continued engagement with the ODR system (as appropriate) until a satisfactory resolution is achieved.

The multimedia content and user interface should be designed in a manner that best suits a consumer engaged in an active case.

Although each court system will have to decide who can access the ES, it was anticipated that *access to the New York ES would not be limited to consumer defendants.* It instead also would be *available to any individual consumers seeking guidance related to their credit card debt.* It was also envisioned that legal services and other resource providers will be able to integrate the content in the ES for the benefit of their users.

In order to improve and refine the ODR system, the ES should allow users to provide feedback regarding the information provided and their experience more

generally. If users opt to revert to the court process and not engage further in the ODR system, then it will be very helpful if the ES can capture the reasons for this decision.

Information to Include in the Expert System

It is not an overstatement to assert that the British Columbia Civil Resolution Tribunal may be the gold standard for an Expert System.¹¹ Conversations with Darin Thompson, Legal Counsel for the British Columbia Ministry of Justice, and a leader in the creation of its Expert System, reveal that a knowledge engineering process of creating detailed decision trees costs several million dollars. Their expert system, called the Solution Explorer, offers detailed guidance about condominium and small claims cases, Google Translate, a searchable decision database, contact information, and step-by-step information about the Civil Resolution Tribunal process. ODR system designers are strongly encouraged to visit the website and explore the thoroughness with which the Ministry has researched and addressed the types of questions that can arise in these two areas of disputes.

Significant time was spent considering the kinds of information and support that should be provided for the New York ODR credit card debt collection system. As a result, the conceptual design for the New York ES includes separate subject matter modules with the following descriptions of the type of information that needs to be built into the ES:

- ***Understanding the process:*** multimedia content providing information on the court process (including deadlines, required pleadings, and appearances) and the process/options available in the ODR system. Proposals can include development of original content or integration of content from other webpages.
- ***Legal referrals:*** multimedia content providing information on how to access appropriate legal services. Proposals do not need to include development of guided pathways to assess whether a consumer is eligible for legal services. Proposals should consider, however, how pathways developed by other legal service providers can be integrated. The information and options presented under this topic will be available to defendants in the expert system at the time they set up their accounts.

These first two modules are especially important. The ODR system never was intended to displace legal services. Instead, it was meant to supplement legal services and, in some instances, help those services become even more efficient and productive. The legal referrals module will further the goal of increasing access to justice by increasing access to legal services. Guided pathways and direct hyperlinks can bring consumers directly to legal services when consumers may be completely unaware those services exist. The next two modules address:

- ***Financial resources & services referrals:*** multimedia content providing financial budgeting tools and general information on available resources to manage debt (including resources on credit reporting). Proposals can include development of original content or integrate content offered by New York State agencies or non-profit agencies.

11. *What is the Strata Solution Explorer?*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca/how-the-crt-works/getting-started/strata-solution-explorer/> (last visited Apr. 25, 2019).

- **Court support:** *links to, or integrates New York Civil Court resources available for consumer credit card debt cases including, but not limited to, relevant forms at Court Help (<http://nycourts.gov/courthelp//DIY/index.shtml>) and LawHelpNY Interactive (<http://www.lawhelpny.org/resource/interactive-forms>). If consumers opt to use these self-help tools, it is likely that they will proceed with their claim in Court and abandon the ODR system. Accordingly, the ODR system should make information in “Understanding the Process” readily available for defendants to competently understand their rights and obligations.*

User autonomy always should be a primary concern. It is important that users do not feel they are being forced into using an ODR platform, or that their decision to use an ODR platform is irreversible. We made certain that consumers were free to leave the system if they believed it would be to their advantage. The fifth module focused on:

- **Consumer protection:** *multimedia content to make consumers aware of consumer protection issues that are ancillary to their claim as well as resources to help deal with those issues. Proposals can include development of original content or integrate content offered by New York State agencies or non-profit agencies.*

The dollar amount of the alleged debt never was the sole concern. The New York ODR platform was designed to educate and assist debtors in ways that went beyond the alleged debt. The system provided information helpful to consumers in both the present and the future.

The next, sixth separate module addressed the critical question of whether an uncollected debt truly existed and whether the amount of that alleged debt was accurate.

- **Debt Substantiation/Verification:** *The ODR system will facilitate direct exchange of information about the debt between consumers and creditors as well as between plaintiffs and defendants.*

The current debt substantiation/verification sequence can be improved to better inform consumers. Consumers do not receive this information at the same time they are served with a debt collection complaint. In response to this problem, this module explained that the ODR platform must accelerate the exchange of important information to help consumers confirm the validity of the alleged debt. This module provided additional guidance as to what should be included in the ES when it is completed.

- **Debt Substantiation:** *New York requires creditors and debt buyers to provide consumers with detailed information regarding their alleged debt upon receipt of a “debt substantiation” letter sent by the consumer (this right exists before a case is filed against the consumer). The platform should integrate the model letter currently available at the New York Dept. of Financial Services.*
- **Verification:** *If a plaintiff has filed a Complaint, the platform should provide a mechanism for the defendant to reach out to the plaintiff at that point and request information verifying their alleged debt. Plaintiffs participating in the pilot will be required to provide defendants with all the information contained in the affidavits that presently is not required until later. The platform should not simply provide copies or reproductions of the affidavits to defendants (which could be confusing) but rather display*

the information contained in the affidavits in a user-friendly manner. Plaintiff will be required to attest that the information provided is accurate.

This module added that the defendant must register at this point.

To facilitate the exchange of information, the defendant will be directed to register an account within the system. All parties will be alerted via email and/or text that a new communication regarding their case has been added to the platform. If the defendant opts to negotiate and/or mediate with the plaintiff, the platform will pre-populate relevant and appropriate verification information into the negotiation and/or mediation stage.

There was little doubt that requiring debt holders to provide debt verification information earlier than currently required under existing court procedures would significantly improve the debt collection process.

The seventh module addressed a subject arguably as important as the material discussed in the preceding sixth module—that being, legal defenses. Individuals who actively opposed ODR for credit card debt collection were extremely concerned that in a virtual space, rather than in a physical courtroom with a judge, repeat-player sophisticated debt holders would have a tremendous advantage over single use consumer defendants. Their concerns were well taken. Accordingly, we continued our efforts to provide every consumer protection possible. Importantly, we wanted to ensure that consumers were aware of available defenses, some of which are absolute. In fact, as soon as certain defenses were found applicable, the ODR process would terminate and the parties would return to the traditional court process. No further negotiation was allowed. Our conceptual design mandated that regardless of whether the court or an outside vendor built the final ES, information regarding applicable defenses must be highlighted. This module explains what needs to be included in the ES regarding legal defenses, as well as the reasoning behind those requirements.

- **Legal Defenses:** *Defenses are sometimes available that will make a debt uncollectable. Debts may have been discharged in bankruptcy, for instance, or certain types of social security income may be protected. It is extremely important that consumers are made aware of these defenses, sometimes referred to as absolute defenses. Defendants will not be permitted to negotiate directly with plaintiffs on the platform if one of these defenses is applicable; it will only be possible to exchange information. The ODR system will provide multimedia content on available defenses, presented via guided pathways or a comparable structure. Depending upon defendants' responses, the ODR system should provide alerts or "red flags" urging defendants to speak with counsel. Proposals should consider whether legal information from counsel can be automatically added to guided pathways.*

If a defendant asserts an absolute defense, the system should:

- 1) *Provide a full explanation of that absolute defense and advise the defendant to seek legal counsel and/or to physically go to court.*
- 2) *Provide defendant with the option of informing the creditor that s/he intends to assert an absolute defense. If defendant chooses this option, defendant will be directed to register an account within the system. A pre-scripted communication (directed to plaintiff) will be suggested to defendant based on information collected*

as defendant navigates the expert system, along with an option to upload documents. Defendant should have the ability to edit the communication. Plaintiff then will have an option to respond to the communication indicating whether it intends to further pursue the case, discontinue it, or request additional information. All parties will be alerted via email and/or text when a new communication regarding their case has been added to the platform.

The Eighth and final module states that the ES must explain all the resolution options. A limited amount of redundancy concerning subjects such as resolution options is desirable,

- **Options for Resolution:** multimedia content providing overview and guidance on options for resolution including going to court, getting legal or financial assistance (incorporating information from topics contained above) or negotiation or mediation via the Dispute Resolution Platform (DRP) (described below). Selecting the option to resolve the matter will lead defendants to the DRP.

After providing eight modules that discuss rather generally what information needs to be included in the ES, the conceptual design then addresses ODR platform registration requirements with more specificity. Other court systems contemplating ODR integration should review this material to determine if they have similar concerns. The conceptual design first focuses on the defendant and provides the following guidance:

The Dispute Resolution Platform (DRP)

Defendant Registration

Timing

As was noted earlier, the defendant may register an account on the system to either reach out to plaintiff to receive verification information or communicate an absolute defense. The defendant may also register an account on the system if it opts to negotiate and/or mediate with the plaintiff. Every defendant should only have to register once and receive one username and password (with the ability to re-set the password).

If at the time the defendant seeks to negotiate and/or mediate with the plaintiff the defendant has not yet sought to verify his/her debt information with the plaintiff on the platform, then the first step after registration will be to send a communication to plaintiff to verify the debt information. After receiving such information, the parties will commence the negotiation and/or mediation phase.

Form

Consumers should be provided with an easily understandable and literacy-level appropriate online registration page where they can (1) provide their name; (2) establish a username and a password; (3) enter contact information (telephone number and/or email address); (4) identify the appropriate plaintiff (via a drop down menu of participating plaintiffs' counsel and/or by entering case identifying information); and (5) insert case-identifying information.

Consumers will need to authenticate their identities, e.g., via a combination of picture and driver's license. Proposals should consider what other authentication procedures might be desirable or preferable.

Counsel for defendants should also have the capability of registering on behalf of their client, or in addition to their client (with the ability to access their client's case information). In instances in which counsel have several clients using the platform, counsel should also have the option to register once and access client cases from the single sign-in (via e.g., a dashboard listing all their cases, or a search feature). The system will pre-populate any relevant information to minimize duplication.

Once consumers register, the system should state clearly and explicitly that communication between the parties outside of the system will be prohibited.

Any proposal to build the ODR platform must keep in mind that the conceptual design makes consumer protection a priority. Again, this includes ensuring that the ODR system is literacy level appropriate and easy to navigate.

The conceptual design then moves to the next steps in the registration process.

Plaintiff's Counsel Registration Process

During the pilot stage we did not want to open participation to all creditors and debt holders. Instead, the conceptual design advises vendors that prior to the launch of the pilot, a select few plaintiffs will be identified to participate. Each participant will need to have pre-established accounts identified by the name of the complainant or the law firm.

The conceptual design allows parties to move to mediation if they cannot reach a negotiated solution. Mediators and court employees who will participate on the platform and perform functions that cannot be done using only technology must have their own registration procedures.

Court and Mediation Center Registration Process

Relevant employees at the Court and Mediation Centers interacting with the system will register (1) creating a username and password; (2) identifying the Court or Mediation Center where they work (from a drop-down menu); and (3) indicating their role (e.g., administrator, Judge, mediator). Administrators at the Court or Mediation Center will receive an email alert when an employee has registered with the system. The Court and Mediation Center administrators will also be able to log in to the system and obtain access to all cases assigned and/or worked on by their personnel.

The conceptual design next emphasizes that login pages need to be engaging, informative and not intimidating. A well-designed ODR platform must be easy to understand and navigate. All proposals to build the ODR platform were encouraged to provide the following specific details.

*Login Pages and Display**Defendant*

Defendants will be able to log into their ODR system accounts on the platform post-registration at will and based on system notifications (sent via text and/or email). A log-in button will be available on the landing page, and available from email/text alerts.

Plaintiffs

Plaintiffs will have pre-established ODR system accounts (during the pilot phase) and will be able to log into their accounts at will and based on system notifications.

Court

The Court will have a pre-established ODR system account and will be able to log into its accounts at will and based on system notifications.

Mediation Centers

The Mediation Centers will have pre-established ODR system accounts and will be able to log into their accounts at will and based on system notifications.

The conceptual design next explains that after logging in, the parties should be able to view information relevant to their case.

Display after Log-In

Defendants should have access to their online “resolution room” to work out their issue. The same online resolution room should be available to all parties (including plaintiff, legal counsel, Court administrators and Judges, and assigned Mediation Centers), but should not be available to any user that has not been granted access to the room.

The resolution room should show contextual status information that informs the party and all other users about whose action is next, the action to be taken, and the deadline for the action, as well as the consequences of not taking the action. This next action information should be contextual, and change based on the role of the user on the case (a mediator should see different contextual information than the party).

Because the defendant likely has one case pending, s/he should be immediately directed to the online “resolution room” after log-in. Parties managing more than one case (including the plaintiff, Mediation Centers, and Court) should be presented with a “dashboard” listing all their active cases. Cases should be organized in terms of priority determined by relevant deadlines for response. Plaintiffs, the Court, and Mediation Centers should also have an option to search for a case based on case-identifying information.

All registration (account) information and case information consequently will be available on a case management system existing independent of the Court's case management system. There is no initial integration of the two systems.

It was important to remember that the ODR system cannot be fully integrated into the New York State case management system because the case management system is not fully digitalized.

The conceptual design next provides a short summary of the consumer debt problem being addressed and the proposed solution.

DISPUTE RESOLUTION PROCESSES

It is necessary that vendors who are going to construct an ODR system have some understanding of context.

Credit card debt collection practices have a troubling history.¹² In most cases consumers targeted by those practices either have default judgments entered against them or sign settlement agreements that may be very difficult to satisfy. Although legal service providers offer valuable assistance, they do not have the resources or personnel to assist each of the thousands of consumers being sued by credit card debt collectors.

The dispute resolution processes that will be offered will be carefully designed and implemented to (1) protect consumers' ability to control the process by which possible settlement will be attempted, and (2) provide communication opportunities in which any power imbalances between consumers and creditors will be mitigated.

Because single use consumers may be less experienced than creditors who may use the system repeatedly, the system must be designed so that communications between consumers and creditors do not provide opportunities to take advantage of consumers.

To further protect the consistency and fairness of the process and to ensure oversight, a creditor will not be allowed to communicate with consumers outside of the platform once the consumer has agreed to negotiate.

The dispute resolution section will provide for two options for on-line settlement: (1) Online Negotiation via Structured Communications; and (2) Online Mediation.

Consumers will be able to choose which settlement option to use for their case and will retain the option to leave the system and have their cases decided in court.

Online Negotiation

Power imbalances between parties can be exploited in virtual spaces. Therefore, the system only should permit structured negotiations rather than unmonitored direct communications between the parties.

Every effort must be made to address power and experience imbalances. To accomplish this goal, the New York City Civil Court is contemplating a structured communications design rather than an open, unregulated dialogue or "chat" space.

12. See N.Y. APPLESEED, *supra* note 10, at 1 ("The New York City Court is at the epicenter of the consumer credit crisis. . . . In October 2006, approximately 50,918 cases were filed in civil court in the five boroughs. In October 2007, 56,724 cases were filed, and in October 2008, 51,949 cases were filed. In each year, consumer debt litigations constituted approximately 40 to 60 percent of the filings.").

The system will offer standardized language to consumers to initiate a dialogue with creditors, for example. Any pre-scripted opening language, questions and responses in the structured communications space should balance efficiencies, neutrality and self-determination. Defendants will be able to provide a statement regarding their circumstances and non-absolute defenses by using pre-determined text options. It also may be desirable to provide an open field for defendants to provide additional information in their own words.

Plaintiffs then will respond with an offer. In order to ensure consistency and fairness, the offer options likely will be pre-scripted. It may be desirable to offer an open field space for the plaintiffs to provide additional specific information. But unless there are assurances that the information entered will not confuse defendants, then this option may not be available.

The flow of questions and answers will be guided by information provided in the Expert System phase. To ensure that consumers control the debt resolution process, consumers can choose the information they wish to share with the creditor and will have opportunities to upload that information.

Rules of conduct and expectations regarding behavior need to be determined and communicated to both consumers and creditors at the outset of the negotiation. Any adverse consequences for failure to abide by those rules must be explained.

One goal is to ensure that the system operates efficiently. Accordingly, engagement in this space will be subject to internal time limits for inactivity. The platform should track engagement and send notices if parties are not participating. The ODR system should ask substantive questions to give debtors an opportunity to provide detailed information regarding their status. The “Understanding the Process” module in the Expert System will clarify time limits built into the different stages of the negotiation process.

Direct communications must be closely monitored, with only certain parties participating in each conversation. Most likely, this would be configured in the following manner:

The parties participating in this pilot project will be limited. Direct communication will occur only between plaintiffs’ counsel and consumers (and/or their counsel). The expectation is that this will be direct text and/or email based asynchronous communication.

The system will advise users that their case is confidential but could be reviewed by Court personnel as part of routine oversight review. In a continuing effort to address power imbalances, the system should include a button to “Report a Party” or include some other mechanism to ensure that parties know there is oversight and that they are accountable for their conduct on the platform.

If the parties come to a resolution, answers to specific questions will auto-populate in a Settlement Agreement Template.

The New York Civil Court currently requires an allocation procedure whereby the terms of a proposed settlement agreement are presented to a judge. It may be desirable, and perhaps even required, for this online dispute resolution process to provide an equivalent opportunity. Proposals should consider how it would be possible to offer the online equivalent of an in-person, in-court allocation. Also consider whether it is possible to design either a synchronous or asynchronous allocation process that would be workable for a judiciary that already has significant demands placed on its time and resources.

Again, it was important to make certain that the parties could easily access assistance outside the platform. A “Report a Party” button is one way consumers can quickly access support and assistance.

The in-court allocation procedure is an attempt to protect consumers from unfair settlements. Vendors can help design a process that will offer comparable protection as part of the ODR system.

The Court will receive an email notification when a Settlement Agreement has been achieved. The Court will access the Settlement Agreements by logging onto the platform and searching for the case, or the case will appear on the dashboard with appropriate notification (or another equivalent option).

The conceptual plan then moved to the next stage. The ODR process would not involve only consumers and debt holders. As mentioned above, a court-monitored allocation process was desirable. Additionally, if the parties could not negotiate a settlement on their own, the ODR system would offer mediation. The conceptual plan anticipated the following mediation case assignment procedure.

Online Mediation

As part of the pilot, a few local Mediation Centers will register to participate, assigning their in-house mediators to cases as they receive notifications of a case that is assigned to the Center. When a defendant requests mediation, the system will send out a notification to the Mediation Center that is next on a rotating list. The Mediation Center staff will assign one of the trained mediators to mediate the case. Each Mediation Center will have a dashboard on the system showing the cases that are assigned to their centers. Individual mediators will create an account on the system.

For cases that have gone through the structured negotiation process before the assignment of a mediator, the mediator will be able to see portions of the structured negotiation file while the case is active. Once the case is closed, the structured negotiation file will be deleted.

The mediators participating in the pilot project are very experienced providing in-person face-to-face mediations. For this reason, proposals should consider how mediations could be held using video software. But video connections are not always reliable, may be complicated or intimidating for first time users, and may be as difficult to schedule as face-to-face mediations. Proposals must explain how these concerns might be addressed and should describe how asynchronous text-based mediation could be provided. They also should consider whether the system should automatically deliver pre-scripted suggestions or instructions that mediators can edit.

Archiving the mediation: After a mediation is closed by the mediators, it is anticipated that the record of the names of the parties, a case number, the mediator assigned, a notation regarding the outcome of the mediation process (e.g., settlement reached or not), and a copy of the settlement agreement (if one was executed) will be maintained in the case management system.

The mediation option in an online environment offers significant opportunities for settlement and presents unique challenges. There are the obvious time, travel, and convenience advantages. But any system must adopt a technology available to all users regardless of whether they access the internet via broadband, DSL, or mobile phone. One must consider whether video connections are available and

reliable in all locations. One also must consider whether mediators trained at face-to-face facilitation can operate as effectively in a text-based environment. These questions will be discussed with the vendor that is selected.

After addressing mediation, the conceptual plan then moved on to settlements. The settlement process should proceed in a consistent, predictable manner. The plan provided the following instructions.

Settlements

If the parties come to an agreement, then the mediator will complete a Settlement Agreement Template. The Settlement Agreement Template should appear in the mediator's online resolution room for the case with names and dates pre-populated.

Final agreements will appear in the parties' online resolution room for the case, and parties will be able to accept and sign the settlement agreement online. The system again will have to address the same allocation questions raised in the structured negotiation process stage. Specifically, the New York Civil Court currently requires an allocation procedure whereby the terms of a proposed settlement agreement are presented to a judge. It may be desirable, and perhaps even required, for this online dispute resolution process to provide an equivalent opportunity. Proposals should consider how it would be possible to offer the online equivalent of an in-person in-court allocation and whether it is possible to design either a synchronous or asynchronous allocation process that would be workable.

The Court will receive an email notification when a Settlement Agreement has been achieved. The Court will access the Settlement Agreements by logging onto the platform and searching for the case, or the case will appear on the dashboard with appropriate notification (or through an equivalent option).

In the event defendants require more time before they can sign the agreement (or would like to have an attorney review before signing), the mediator can submit the agreement to the parties' online resolution room with an agreed upon timeframe to respond. If the defendant fails to respond within the allotted timeframe, then the mediator can offer to schedule another mediation session or offer the opportunity to finalize the agreement via the structured negotiation space.

Consumers should have multiple opportunities to reconsider their choices before reaching a final settlement.

The conceptual design next discussed what would happen if the case was not settled. Consumers never were going to be left without support if they did not reach a resolution using the platform. At a minimum the following guidance would be provided.

If Settlements are not reached

The system will calculate the remaining time for defendant to answer the complaint and notify the defendant to go to court where the action is filed to answer.

Finally, the conceptual design addressed more than just the system design. It included specific requirements for potential vendors regarding timelines, financial models, metrics and analytics.

Timeline for Proposals

Proposals should include a timeline with as much specificity as possible, including the times at which certain activities will be undertaken and milestones at which certain deliverables can be anticipated.

Financial Model

Understanding that it may be impossible at this point to include a detailed financial model, proposals should nonetheless describe in as much detail as possible the estimated cost of building the dispute resolution system, training New York Court personnel, and maintaining the system.

The proposal should identify the initial investment that New York must make to build the system, and indicate whether maintenance costs would be shared, and if so, include an appropriate percentage allocation. It should also state whether a fee-based structure or some other approach could be implemented to make the system self-sustaining.

The financial model should place a high value on making the cost and pricing structure as transparent and traceable as possible.

The final subjects discussed in the conceptual plan were metrics and analytics. Because this would be a pilot program it was extremely important to learn as much as possible about what works, what does not, what can be improved, and how to do so. We were very interested in the vendors' suggestions as to how we should solicit and collect that information. They were going to be asked for proposals in very general terms to see how they responded

Metrics and Analytics

Proposals should include types of data that will be collected and analyzed by the platform for the benefit of court administrators, e.g., the number of parties initiating negotiation versus settlement rate, and number of days to achieve settlement agreements.

Lessons Learned

We spent our first-year consulting with virtually everyone in the field that could be identified. We had numerous interactions with entities that either offer complete ODR systems or support some level of remote or online dispute resolution. Those entities included, for example, Modria,¹³ Matterhorn/Court Innovation,¹⁴ the British

13. TYLER TECHNOLOGIES, *supra* note 2. (Modria is an ODR platform created by Colin Rule and Chittu Nagarajan that has helped bring the ODR process from the private sector to the public sector.).

14. *Improve Access to Justice Via ODR*, MATTERHORN BY CT. INNOVATIONS, <https://getmatterhorn.com> (last visited Apr. 25, 2019) (Matterhorn is an ODR platform that can be used in small claims court, family court, and traffic court among others. It is currently being used in ten states.).

Columbia Civil Resolution Tribunal,¹⁵ SmartSettle,¹⁶ SettlementIQ,¹⁷ Guided Resolution (Australia),¹⁸ Trokt,¹⁹ Pro Bono Net,²⁰ Civil Money Claims Online (UK),²¹ LegalServer,²² the New Media Advocacy Project,²³ Neota Logic Inc.,²⁴ CourtHelp,²⁵ CourtCall,²⁶ New York State Department of Consumer Affairs,²⁷ New York State Department of Financial Services,²⁸ LawHelpNY.org,²⁹ the National Center for State Courts,³⁰ and the Dispute Resolution Section of the American Bar Association.³¹ Darin Thompson at the British Columbia Civil Resolution Tribunal was especially generous with his time and his staff members' time. He repeatedly made himself and his staff members available to talk with us at length when we had questions about specific stages in our ODR system design process. He also always was willing to demonstrate the Civil Resolution Tribunal platform for Ms. Colon,

15. *Welcome to the Civil Resolution Tribunal*, CIV. RESOL. TRIBUNAL, <https://civilresolutionbc.ca> (last visited Apr. 25, 2019) (Canada's ODR program is currently being used in small claims court and for strata property. Starting in April 2019, it will also be used for claims arising from motor vehicle accidents.).

16. SMARTSETTLE, *supra* note 3 (Smartsettle, created by iCan Systems, Inc. (President and Founder Dr. Ernest Thiessen), offers a variety of product to parties, stand-alone individual, professional negotiators, and facilitators to be used in resolution of claims.).

17. SETTLEMENT IQ, <http://www.settlementiq.com> (last visited Apr. 25, 2019) ("SettlementIQ was developed for attorneys, business professionals, and government agencies by attorneys and business executives. It is solution that fits within your existing workflow to facilitate settlements.").

18. GUIDED RESOL., <https://www.guidedresolution.com> (last visited Apr. 25, 2019).

19. TROKT, <http://www.trokt.org> (last visited Apr. 25, 2019) (Trokt is an online platform that allows parties to create a legally binding agreement. Trokt is used primarily for special needs education, access to justice, and state and local government.).

20. *Our Mission: Who We Are & What We Do*, PRO BONO.NET, <https://www.probono.net> ("Pro Bono Net is a national nonprofit, founded in 1999, dedicated to increasing access to justice. Through innovative technology solutions and expertise in building and mobilizing justice networks, Pro Bono Net transforms the way legal help reaches those in low income and vulnerable communities.").

21. *Welcome to Money Claim Online*, HM CTS. & TRIBUNALS SERV., <https://www.moneyclaim.gov.uk/web/mcol/welcome> (last visited Apr. 25, 2019) (an online platform for the United Kingdom courts that allows claimants to bring their claim for a fixed amount of money).

22. *Why LegalServer*, LEGALSERVER, <https://www.legalserver.org> (last visited Apr. 25, 2016) (LegalServer is a case management software "[d]esigned to improve the effectiveness of data collection and action by enhancing the process by which data is collected, stored, and used, LegalServer will facilitate better communication, collaboration and reporting.").

23. *Reframing Human Rights*, NEW MEDIA ADVOC. PROJECT, <https://www.nmap.co> (last visited Apr. 25, 2019) (New Media Advocacy Project is a non-profit that uses film and media to advocate for human rights).

24. NEOTA LOGIC, <https://www.neotalogic.com> (last visited Apr. 25, 2019) (Neota Logic is a platform and tool set that allows attorneys to automate legal advice, process workflow and document creation.).

25. *Court Help: Find the Help You Need to Represent Yourself in NY Courts*, N.Y. COURTS.GOV, <https://www.nycourts.gov/courthelp/> (last visited Apr. 25, 2019) (Court Help is a website that provides pro se litigants with information about the court process.).

26. *The Modern Courtroom*, CT. CALL, <https://courtcall.com> (last visited Apr. 25, 2019) (Court Call is a system that allows judges, attorneys, and parties to appear in court remotely.).

27. *NYC Consumer Affairs*, NYC.GOV, <https://www1.nyc.gov/site/dca/index.page> (last visited Apr. 25, 2019).

28. N.Y. ST. DEP'T FIN. SERVS., <https://www.dfs.ny.gov> (last visited Apr. 25, 2019).

29. LAWHELPNY.ORG, <https://www.lawhelpny.org> (last visited Apr. 25, 2019) (Law Help New York provides information about legal issues and provides resources for individuals looking to bring a claim.).

30. NAT'L CTR. FOR ST. CTS., <https://www.ncsc.org> (last visited Apr. 25, 2019).

31. *About the Section*, ABA, https://www.americanbar.org/groups/dispute_resolution/ (last visited Apr. 25, 2019) ("This Section is a global leader in dispute resolution. We advance and promote fair, prompt, and cost-effective dispute resolution. We convene, facilitate, and support innovative research, education, debate, and collaboration on dispute resolution policy and practices.").

Ms. Rogers, interested New York Court staff, or me. Modria, Matterhorn, SettlementIQ, the New Media Advocacy Project, and Neota Logic Inc. also repeatedly answered our questions and provided us with helpful information.

We attempted to contact as many relevant stakeholders as possible (including creditors, creditor organizations such as the Commercial Lawyers Conference of New York, debt buyers, and consumer representatives like the City Bar Justice Center). As we integrated increasingly voluminous amounts of information into the conceptual system design, we were optimistic that our design ultimately would be reformatted and issued as an official request for proposals. But as we were moving forward to issue a formal request for proposals to build the system, a relatively small group of legal advocates presented surprising and unanticipated resistance. We had invited legal service providers to participate in our design process from the beginning and some legal service providers did participate. They were advised as to each stage we were proposing in our conceptual design and they offered their feedback and suggestions. I am not a New York State Court employee and was not involved with contacting stakeholders, but it is my understanding that Civil Legal Advice and Resource Office (CLARO)³² was invited to participate in our design process at an early stage like other legal service providers. And we did have a conversation with a CLARO representative on July 16, 2017. It was only very late in the process that they declared their opposition.

CLARO explained that it provides limited legal advice to low-income New Yorkers sued by debt collectors.³³ It does not represent individuals in court, but instead its volunteer lawyers and consumer law experts explain how alleged debtors can best represent themselves. To my knowledge, no one involved with the ODR system design process questions whether CLARO provides valuable assistance to the clients they advise. In fact, it would improve the debt collection situation dramatically if every consumer debtor had the opportunity to have a private conversation with an attorney. But the problem is that there simply are not enough attorneys and resources to provide individual assistance to the tens of thousands of consumer debtors in New York. CLARO acknowledges in its website video that since January 2007 it has assisted in only 5,000 cases across the five New York boroughs.³⁴ The ODR system never was intended to replace legal service organizations like CLARO. It was intended to help tens of thousands of individuals who currently are not receiving any support at all.

The irony is that the proposed ODR system would have increased access to legal service organizations. It provided multiple opportunities to seek assistance from legal service providers throughout the ODR process via hyperlinks and contact information. It also included explicit instructions as to when consumers had absolute defenses and should leave the platform and resort to traditional court processes. Unfortunately, there was a critical lack of understanding. In discussions with those opposed to the ODR project, it became clear that they were not familiar with ODR but were trying to understand the concept.

Consumer debt advocates are passionate about their work and are committed to doing everything possible to assist unrepresented consumer defendants. And their concerns about ODR are well-founded. If the ODR platform was simply going

32. *Why Come to CLARO?*, CIV. LEGAL ADVICE & RES. OFF., <http://www.claronyc.org/> (last visited Apr. 25, 2019).

33. *Id.*

34. *Id.*

to send unrepresented consumers into virtual spaces with experienced, sophisticated debt holders to engage in an unregulated, unsupervised negotiation, then that clearly would be a problem. That, of course, was not what the ODR platform was going to do. Even though it was late in the process, the proposal might have survived if there had been more complete communication.

At this point I wanted to give the individuals opposing the proposal the entire plan for review. Protections embedded in the proposal and the repeated opportunities to seek outside assistance or return to the off-line court system would have alleviated their fears. In the end, shortly before an official Request for Proposals was to be issued, the court system did not believe it could release the final draft of the proposed system that was going to be the subject of the Request. The legitimate concern was that the early release of specific information to a small group of select individuals would expose the request process to the claim that it had been compromised or tainted. The numerous interactions with the entities identified above had all taken place during the drafting process, and no entity had been given the complete conceptual design for review or comment.

New York did try to address the opposition's concern. The group opposing the proposal was shown a summary PowerPoint presentation of the proposed system. New York honestly believed that this would provide an effective overview and explanation of the ODR conceptual design. A temporal, abbreviated visual presentation does not, however, provide the opportunity for reflection and depth that would have been available through a thorough review of the complete written proposal.

We spoke with a variety of legal service providers during the eighteen months we worked on the design and have notes recording those conversations. At one of our final meetings, the group opposing the proposal demanded that we disclose the names of the legal service representatives with whom we had spoken. New York decided that because the opposition group was so aggressive, if we disclosed the names of the legal service attorneys with whom we had spoken, those persons may also become targets of this group. The legal service providers we had spoken with had been very helpful in explaining their concerns and it was decided that they needed to be protected. This was a judgment call not to release the names and protect those who had cooperated, but unfortunately it further fueled the frustration and distrust of the group opposing the proposal.

The fears of the consumer debt advocates opposing the ODR platform were not allayed and they campaigned aggressively against the proposal. The following incident provides an example of how threatening innovation and change can be, especially when there is a lack of information and understanding.

The concern that consumer debt advocates have for their clients is obvious. But that intensity seemed to drift towards a level of suspicion I previously had never personally experienced. At one of the final in-person meetings with a CLARO representative and several other individuals opposing the platform, one person aligned with that group implied that I may be promoting an ODR platform because I would reap a financial benefit. I had no idea what she was talking about. She then suggested that I may have a financial relationship with The Hague Institute for Innovation of Law (HiIL), a non-profit organization in the Netherlands that had developed Rechtwijzer. Rechtwijzer was one of the first comprehensive ODR platforms in the

world and was used for family law disputes.³⁵ The implication was that I might personally benefit if New York adopted an ODR platform in which I had a financial interest.

I never have had a financial relationship with any ODR provider and was puzzled by the suggestion. Why would she think I had a financial relationship with a Dutch ODR provider? Then I realized the connection she was trying to make. In May 2016, I was one of the many speakers at the 15th annual ODR Forum held at The Hague and sponsored by HiiL. It is an annual global conference that brings together individuals interested in exchanging ideas about ODR. I was only one of a long list of presenters at the two-day conference.

Presenters at the conference are responsible for their own expenses. I obviously am very interested in ODR and have attended seven of the annual conferences, always at my own expense (or the expense of my law school). I genuinely felt bad that at least one individual in the opposition group was so disturbed at the prospect of alleged debtors negotiating in virtual spaces that she would assert such an unsupported and speculative motivation. But I knew that level of desperation was fueled in part by a lack of understanding concerning the high level of consumer protection that had been built into the proposal. I did not take offense and was saddened the process was unfolding in this manner.

The fact is, however, that there is no guarantee the outcome would have changed even if the entire conceptual design had been released. Innovation is exciting, but implementation can be difficult. And changing an existing legal system can be especially difficult, particularly if that change will insert technology unfamiliar to lawyers, court staff, and judges into court processes. The consumer debt advocates opposing the ODR had valid concerns. It is likely that under any circumstances implementation of this ODR system would have faced resistance.

The result is that the opposition group was able to stop the proposal. Consequently, tens of thousands of unrepresented defendants will not have access to this platform. This article is intended to help other jurisdictions understand how an ODR system similar to this one, with the same types of protections, can assist and protect unrepresented litigants.

Lesson one: Although this suggestion should not be a surprise to anyone, anticipate conflicts and resistance. We had a remarkable number of meetings over our two-year design period and sometimes spoke with interested and potentially affected individuals three times a week. But when it comes to innovation there almost always will be resistance. Sometimes it is caused by a deep investment in the status quo and sometimes it is simply anxiety and uncertainty about an unknown future. Whatever the cause, anticipate that there will be resistance and devise a response strategy.

Lesson two: Enlist the support and involvement of judges and court staff from the outset. The active participation, or at least the endorsement, of a Supreme Court Justice or the Chief Judge of the court with which you are working lends immediate credibility and perhaps even authority to the ODR building process. The New York project did receive direction from higher levels of the court system, but we did not

35. HiiL, <https://www.hiil.org/projects/building-agreement-online-for-family-conflicts/> (last visited Apr. 25, 2019).

have a judge(s) working closely with us. We took a grass roots approach and assumed a thoroughly-researched and well-designed program would work its way relatively smoothly up through the required channels. We learned that other divisions or departments whose participation is essential may not be excited to change the way they do business. We learned it is impossible to guarantee that every stakeholder in the state will participate in the ODR design process even if everyone is invited. We spent a year reaching out as widely as possible and still did not get everyone involved to the degree necessary to ensure success.

The state of Utah offers an example of how much more smoothly an ODR process can progress when high-ranking judges are actively involved. Utah Supreme Court Justice Deno Himonas has been a strong supporter of ODR from the outset and has been the leader in Utah's effort to integrate ODR into the official court system. Utah began its ODR effort about the same time as New York, but the West Valley City Justice Court already is testing ODR in its small claims courts.³⁶ With Justice Himonas's leadership, the court system and the bar associations were more inclined to take a supportive view of ODR.

Lesson three: If a jurisdiction is going to rely on an outside vendor to build the ODR platform, which many jurisdictions will do because of the cost and time commitment required to build and maintain an internal system, it is important to determine how to collect information and educate yourself about what is possible technologically while still ensuring an unbiased request for proposals bidding process.

It also is critical to not only inform but engage interested stakeholders in the process as early as possible. If stakeholders are aware of the general direction that the process is taking, they may not need to see the final comprehensive proposal before it is issued as a formal Request for Proposals.

Lesson four: Pick your case type carefully. New York State has a tremendous problem with credit card debt collection cases that is harming tens of thousands of consumer debtors. It was hoped that ODR would dramatically increase access to justice by educating unrepresented litigants, helping them avoid default judgments, and by increasing participation in the debt collection process.

But as I expressed at the first meeting I attended, the protective regulatory scheme that had been constructed over a period of years was going to be very difficult to duplicate online. Individuals and entities enforcing those protections would insist that any ODR system include those same protections, no matter how complicated. Because most new ODR systems will be pilot projects, the cases should be of a low value, high volume, relatively unregulated nature.

Proponents should seriously consider whether a pilot ODR project is an appropriate response to a crisis. In a true crisis people are being significantly harmed, emotions are strong, people may be inflexible because of a perceived need to hold fast to a specific position or approach, and time may be of the essence. A new ODR system may be more acceptable in a less contentious environment. Yet if the choice is to proceed with a more complicated case type for a pilot project, the lessons learned in the New York pilot and outlined above apply.

36. *Small Claims Online Dispute Resolution Pilot Project (ODR-West Valley City)*, UTAH CTS., <https://www.utcourts.gov/smallclaimswvc/> (last updated Sept. 20, 2018).

CELEBRATION

Was the New York ODR credit card debt collection project a failure? It was not. A detailed, comprehensive ODR credit card debt collection platform was created that someday may be implemented in New York. And if it is not adopted in New York, then it may be useful in another jurisdiction. Additionally, the experience and insights that have been gained are helping a new, different, second New York pilot project move forward.

The case type for the second ODR pilot project is far less regulated. The second proposed ODR system is being designed for lower value cases. Rather than the original \$25,000 limit proposed for the credit card debt collection ODR system, the new system will accept cases only up to \$5,000. A variety of cases will be expressly excluded. The system will not accept real property cases, commercial cases, landlord tenant issues, cases involving third party actions, cases with a domestic violence history or an Order of Protection, or cases where only one party is represented. The cases will be limited to goods and services.

This time the small claims court staff and the Administrative Judge have been involved from the outset. Administrative Judge for the New York Civil Court Hon. Anthony Cannataro's support for a new ODR proposal was received before we began drafting any specific proposals. General discussions were had with Judge Cannataro throughout the drafting process and Assistant Deputy Chief Clerk—New York County Civil Court Ananias Grajales provided invaluable detailed information and insights at each stage of the drafting process.

This second ODR project already has moved further forward than the credit card debt collection proposal. A formal Request for Proposals was issued, and a vendor has been selected. We already have completed a detailed workflow diagram, selected the animated characters and drafted the scripts for introductory videos, and are finishing the pre- and post- ODR participant survey questions.

This second ODR project, unlike our first attempt, will be implemented. Why am I so confident? Because we are returning to the case type I suggested in October 2016: small claims.